Kelly Food Products, Inc. *and* Local No. 316, Bakery, Confectionery & Tobacco Workers International Union, AFL–CIO–CLC. Case 33–CA–11966

May 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon a charge filed by the Union on October 22, 1996, the General Counsel of the National Labor Relations Board issued a complaint on December 30, 1996, against Kelly Food Products, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On April 10, 1997, the General Counsel filed a Motion for Summary Judgment with the Board. On April 11, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On April 21, 1997, Mariann Pogge (the Trustee) filed a response, stating that she was appointed Trustee in the Kelly Food Products, Inc. bankruptcy proceeding on February 4, 1997, that the Respondent has completely shut down and has ceased doing business, and that the tangible assets have been liquidated, and requesting that the complaint be dismissed.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted.[1]

Although the Trustee has filed a response to the notice to show cause stating that the Respondent is in bankruptcy, has shut down and ceased doing business, and has no assets, we find that this response does not explain the failure to file an answer within the time permitted and does not constitute an adequate answer under Section 102.21 since it fails to specifically admit, deny, or explain the allegations of the complaint, and that it otherwise fails to assert any basis for holding a hearing or dismissing the complaint. See *Pimlico Elder Care*, 296 NLRB 1086, 1087 (1989), and cases cited there. See also *Phoenix Co.*, 274 NLRB 995 (1985) (bankruptcy proceedings); and *Ambulance Service of New Bedford*, 229 NLRB 106, 110 (1977) (discontinuance of business).

Accordingly, in the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment and deny the Trustee's request to dismiss the complaint.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Decatur, Illinois, has been engaged in the business of the processing and sale of snack foods and related products. During the 1996 calendar year, the Respondent, in conducting its business operations, sold and shipped from its Decatur, Illinois facility goods valued in excess of $50,000 directly to points outside the State of Illinois and purchased and received at its Decatur, Illinois facility goods valued in excess of $50,000 directly from points outside the State of Illinois. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees, including warehouse employees employed at the Respondent's Decatur, Illinois facility, but excluding casual or "extra" employees such as temporary potato unloaders, office clerical employees, driver-salesmen, guards, professional employees, and supervisors as defined in the Act.

Since at least 1975 and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from October 10, 1993, through October 5, 1996. At all times since at least 1975, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about July 29, 1996, and again on August 30 and September 11, 1996, the Union requested the Respondent to bargain collectively with the Union as the

[1] No further reminder or warning of the consequences of failing to file an answer was sent or given to the Respondent, but this does not warrant denial of the motion. See, e.g., *Superior Industries*, 289 NLRB 834, 835 fn. 13 (1988).

exclusive collective-bargaining representative of the unit.

About October 11, 1996, the Respondent closed its Decatur, Illinois facility causing the termination of approximately 65 unit employees. The Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the effects of this conduct. About October 14, 1996, the Union requested that the Respondent bargain collectively with the Union over the effects of the closure, and about the same date the Respondent refused and has continued to refuse.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain over the effects of the decision to close the Decatur, Illinois facility, causing the termination of 65 unit employees, we shall require the Respondent to bargain with the Union concerning the effects of the closure on its unit employees, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the terminated employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closure on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

In view of the fact that the Respondent's facility is currently closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Kelly Food Products, Inc., Decatur, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Local No. 316, Bakery, Confectionery & Tobacco Workers International Union, AFL–CIO–CLC, as the exclusive bargaining representative of the employees in the following unit by closing its Decatur, Illinois facility and terminating unit employees without providing the Union prior notice or an opportunity to bargain with respect to the effects on the unit employees of the decision:

> All full-time and regular part-time production and maintenance employees, including warehouse employees employed at the Respondent's Decatur, Illinois facility, but excluding casual or "extra" employees such as temporary potato unloaders, office clerical employees, driver-salesmen, guards, professional employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union with respect to the effects on the unit employees of its decision to close its Decatur, Illinois facility, and reduce to writing any agreement reached as a result of such bargaining.

(b) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, mail an exact copy of the attached notice marked "Appendix"[2] to Local No. 316, Bakery, Confectionery & Tobacco Workers International Union, AFL–CIO–CLC, and to all unit employees. Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with Local No. 316, Bakery, Confectionery & Tobacco Workers International Union, AFL–CIO–CLC as the exclusive bargaining representative of the employees in the following unit by closing our Decatur, Illinois facility and terminating unit employees without affording the Union prior notice or an opportunity to bargain with respect to the effects on the unit employees of the decision:

> All full-time and regular part-time production and maintenance employees, including warehouse employees employed at our Decatur, Illinois facility, but excluding casual or "extra" employees such as temporary potato unloaders, office clerical employees, driver-salesmen, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with the Union with respect to the effects on our unit employees of our decision to close our Decatur, Illinois facility, and reduce to writing any agreement reached as a result of such bargaining.

WE WILL pay the unit employees their normal wages for the period set forth in a decision of the National Labor Relations Board.

KELLY FOOD PRODUCTS, INC.